

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

**NORMA MARTINEZ**  
Claimant

VS.

**TYSON FRESH MEATS, INC.**  
Self-Insured Respondent

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Docket No. **1,039,707**

**ORDER**

Self-insured respondent requests review of the August 14, 2008 preliminary hearing Order for Compensation entered by Administrative Law Judge Brad E. Avery.

**ISSUES**

Claimant developed an incisional hernia at the umbilicus which was surgically repaired. Respondent denied the hernia was work-related. The Administrative Law Judge (ALJ) found claimant had met her burden of proof to establish accidental injury arising out of and in the course of employment with respondent.

Respondent requests review of whether claimant's injury arose out of and in the course of employment on October 17, 2007. Respondent argues the medical evidence establishes that claimant's work neither caused nor aggravated the hernia condition and the ALJ's Order for Compensation should be reversed.

Claimant argues the ALJ's Order for Compensation should be affirmed.

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Having reviewed the whole evidentiary record filed herein, this Board Member makes the following findings of fact and conclusions of law:

Claimant was employed by respondent in a job that required her to stand in one place and take a hose that was suspended from the ceiling and clean off the cattles' hooves. The pressure hose was suspended from the ceiling with a counterbalance. But claimant testified that the counterbalance was broken which caused her to hold the weight of the hose which she estimated at 25 pounds and also made it more difficult to hold under pressure while in use.

Claimant testified:

Q. Okay. When the pressure is coming out of the end of this pressure washer, is there a lot of -- does it take you a lot of pressure to hold the pressure washer in place to wash the hocks?

A. Yes, because the counterbalance, since it was not working, I had to carry the instrument.<sup>1</sup>

As claimant was performing her job duties on October 16, 2007, she noticed a painful pulling sensation in her stomach. Claimant went to the plant nurse who palpated her stomach and discovered a hard ball in that area.

Claimant testified:

Q. What happened? Now, we're talking about your hernia, not your shoulder?

A. Started hurting, my stomach started hurting. I was feeling like something was pulling on me from my belly button, from my belly button. I went to the nurse, told her what was happening. She touched me, and there was a ball in there. She felt a ball.<sup>2</sup>

On October 19, 2007, claimant was evaluated by a nurse practitioner, Leighton York. He diagnosed claimant with abdominal pain and possible umbilical hernia. Claimant provided a history that she had discovered a little hard ball in her left lower quadrant while taking a shower but it was not painful. She then further noted that the onset of continuous pain occurred about halfway through her shift at work in October 2007. Mr. York placed restrictions on claimant of no lifting, pushing and pulling greater than 20 pounds and work only half days. Mr. York could not determine whether or not claimant's problem was work related.

Claimant testified that when she first discovered the bulging in her abdomen which she described as a ball it was only painful to the touch. But the pain gradually worsened and while performing her work on October 16, 2007, the pain became continuous.

Respondent referred claimant to Dr. Thomas E. Hicks Jr. On October 23, 2007, claimant advised the doctor that she had increasing pain in her abdomen since October 16th due to using a pressure washer to wash hocks on cattle. In Dr. Hicks' office notes on

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<sup>1</sup> P.H. Trans. at 8.

<sup>2</sup> *Id.* at 6-7.

October 23, 2007, claimant had informed him that she had been having increasing periumbilical and left lower quadrant abdominal pain since October 16th when she was using a pressure washer to wash hocks on cattle.

On January 29, 2008, claimant was seen by Dr. Tim Harris upon referral by respondent. Dr. Harris diagnosed claimant with a symptomatic incisional hernia and recommended surgical repair. Dr. Harris also reviewed a video tape which showed claimant's work activity. After reviewing the videotape of claimant's job, the doctor did not feel that claimant's hernia was work related.

She really has no significant lifting associated with the work and I feel that the hernia is probably more a contributing factor from her weight rather than her work activities.<sup>3</sup>

Ultimately, Dr. Harris performed surgery on March 5, 2008 to repair claimant's hernia. After a follow-up visit with the doctor on April 4, 2008, she was released to return to work on April 7, 2008.

On May 6, 2008, the ALJ ordered an independent medical examination of claimant by Dr. Terrance Pratt to determine whether or not claimant's hernia complaints were caused, aggravated or accelerated by her work duties at Tyson resulting in her subsequent need for medical treatment.

Dr. Pratt performed a physical examination of claimant and in his report dated July 29, 2008, he opined in pertinent part:

Based on all of the information available, her work tasks for Tyson did not result in the hernia, which was identified apparently in September while she was taking a shower. It does not appear that it was accelerated by her work tasks, but it does appear that she had some aggravation of the symptoms in relationship to work tasks after the abnormality was identified or she became more symptomatic while performing work tasks. This may in part be due to the fact that she reports that the machine or mechanism was not functioning properly while she was performing work tasks, which could have resulted in a change in body mechanics. If the historical information is not accurate, then the opinions may change.

In summary, it appears that she had aggravation of underlying involvement, but the incisional hernia was a condition that was not caused by her vocationally related

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<sup>3</sup> P.H. Trans., Cl. Ex. 1.

activities. She had an increase in symptoms after the abnormality was noted with an increase in symptoms reported while performing vocationally related activities.<sup>4</sup>

It is well settled in this state that an accidental injury is compensable even where the accident only serves to aggravate or accelerate an existing disease or intensifies the affliction.<sup>5</sup> The test is not whether the job-related activity or injury caused the condition but whether the job-related activity or injury aggravated or accelerated the condition.<sup>6</sup> And the claimant's testimony alone is sufficient evidence of her physical condition.<sup>7</sup>

Initially, it should be noted that it is unclear whether Dr. Harris was aware of claimant's uncontradicted testimony that the counterbalance was broken and she had to support the weight of the pressure hose. Although Dr. Pratt initially states that it does not appear that claimant's work activities accelerated her hernia, nonetheless, in his summary he states that claimant had an aggravation of the underlying involvement. This statement connotes more than merely an aggravation of symptoms. And the increase in pain ultimately led to the need for the surgery to repair the condition. Based upon the evidence compiled to date this Board Member finds claimant has met her burden of proof to establish she suffered a work-related aggravation and intensification of her preexisting hernia. The ALJ's Order for Compensation is affirmed.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.<sup>8</sup> Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2007 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.<sup>9</sup>

**WHEREFORE**, it is the finding of this Board Member that the Order of Administrative Law Judge Brad E. Avery dated August 14, 2008, is affirmed.

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<sup>4</sup> Dr. Pratt's IME at 4.

<sup>5</sup> *Harris v. Cessna Aircraft Co.*, 9 Kan. App. 2d 334, 678 P.2d 178 (1984); *Demars v. Rickel Manufacturing Corporation*, 223 Kan. 374, 573 P.2d 1036 (1978); *Chinn v. Gay & Taylor, Inc.*, 219 Kan. 196, 547 P.2d 751 (1976).

<sup>6</sup> *Hanson v. Logan U.S.D.* 326, 28 Kan. App. 2d 92, 11 P.3d 1184, *rev. denied* 270 Kan. 898 (2001); *Woodward v. Beech Aircraft Corp.*, 24 Kan. App. 2d 510, 949 P.2d 1149 (1997).

<sup>7</sup> *Hanson v. Logan U.S.D.* 326, *supra*.

<sup>8</sup> K.S.A. 44-534a.

<sup>9</sup> K.S.A. 2007 Supp. 44-555c(k).

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of October 2008.

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HONORABLE DAVID A. SHUFELT  
BOARD MEMBER

c: Robert R. Lee, Attorney for Claimant  
Gregory D. Worth, Attorney for Respondent  
Brad E. Avery, Administrative Law Judge